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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 574

JULIUS GARFINCKEL & CO., INCORPORATED (Successor to Brooks Brothers, Inc., formerly The A. DePinna Company),

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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OCTOBER TERM, 1964.

No.

JULIUS GARFINCKEL & Co., INCORPORATED (Successor to Brooks Brothers, Inc., formerly The A. DePinna Company),

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the Tax Court of the United States.

Opinion Below.

The opinion of the Court of Appeals is printed in the Appendix (A-1).[1] It has not yet been officially reported.

Statement of Jurisdiction.

The judgment of the Court of Appeals was entered on July 14, 1964, and the jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

The question is whether, under the decision of this Court in *Libson Shops Inc.* v. *Koehler*, 353 U. S. 382 (1957), a corporation which is continuously engaged in conducting a substantial business activity must be deprived of its statutory right to a net operating loss carryover, to which it would otherwise admittedly be entitled under Sections 23(s) and 122(b)(2)(B) of the Internal Revenue Code of 1939, merely because it acquires by consolidation assets of a commonly controlled corporation engaged in a similar business.

Statutory Provisions Involved.

The statutory provisions involved are Sections 23(s) and 122(b)(2)(B) of the Internal Revenue Code of 1939. Section 23(s) provides:

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[1] The designation "(A)" refers to the Appendix hereto and the designation "(R)" refers to the "Appendix Accompanying Opening Brief for Appellant (Containing the Material Parts of the Record on Review)" in the Court of Appeals.

> "In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (s) *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under Section 122."

The relevant portion of Section 122(b)(2)(B) provides:

> "If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the five succeeding taxable years * * *."

Section 122 also provides for a carryback of certain net operating losses, but, as shown by the stipulated facts herein, that provision is not applicable to this case because the Corporation had no net income for its taxable year ending January 31, 1950 (R. 23).

Statement of the Case.

The petitioner is a Virginia corporation which has for many years been engaged in the department store business in Washington, D. C. In 1946 and 1947, the petitioner acquired all of the stock of Brooks Brothers, a New York corporation long engaged in the manufacturing and retail selling of men's clothing (R. 17-18). In January 1950, the petitioner acquired more than 50 per cent of the outstanding common stock of The A. DePinna Company (the "Corporation"), another New York corporation which was engaged in selling both men's and women's clothing at retail, and an option to purchase approximately 60 per cent of its outstanding preferred stock, which was later exercised (R. 19, 20).

Following the petitioner's acquisition of a controlling interest in the Corporation, the Corporation sustained net operating losses, which it reported on its Federal income tax returns in the following amounts for the periods indicated (R. 22):

Period	Net Operating Loss
2/1/50-7/31/50	$208,903.27
8/1/50-7/31/51	310,851.66
8/1/51-7/31/52	71,087.01

On February 29, 1952, Brooks Brothers was consolidated into the Corporation pursuant to Section 86 of the New York Stock Corporation Law.[2] The outstanding common stock of Brooks Brothers held by the petitioner was converted into shares of common stock of the Corporation, so that as a result of this consolidation the petitioner owned approximately 95 per cent of the Corporation's outstanding common stock (R. 19-20). The Commissioner of Internal Revenue has not disputed the existence of substantial business reasons for this consolidation (R. 29, A-3).

After the consolidation of Brooks Brothers into the Corporation, the Corporation continued to carry on its prior business in its DePinna Division, while the business formerly carried on by Brooks Brothers was carried on by the Corporation's newly-established Brooks Brothers Division (R. 21). For its fiscal year ending July 31, 1953, the first full year after the consolidation, the DePinna Division operated at a loss, but the Corporation operated at a substantial profit as a result of profits earned by the Brooks Brothers Division. The losses which the Corporation had sustained after a controlling interest in it was acquired by the petitioner were carried forward as a net operating loss

[2] At this time the Corporation's name was changed to Brooks Brothers, Inc. (R. 20).

carryover and applied against its profits as reported on its Federal income tax return for its fiscal year ending July 31, 1953[3] (R. 22-23).

The Commissioner of Internal Revenue disallowed this net operating loss carryover deduction on the basis of the decision of this Court in *Libson Shops* v. *Koehler, supra.* The petitioner filed a petition for the redetermination of this deficiency with the Tax Court of the United States pursuant to Section 272(a) of the Internal Revenue Code of 1939, and the Tax Court in a decision reported at 48 T. C. 870 (1963) (R. 2) sustained this determination. The Court below affirmed the Tax Court's decision by holding that the *Libson Shops* case is not rendered inapplicable by the fact that the surviving corporation which seeks the deduction is the same corporation that incurred the losses, even though that corporation continues to carry on the same business with the same controlling stockholder.

Reasons for Allowance of the Writ.

The Decision of the Court of Appeals Is a Misapplication of the *Libson Shops* Decision of This Court.

In *Libson Shops Inc.* v. *Koehler, supra,* this Court held that a corporation resulting from a merger may not carry over and deduct the pre-merger net operating losses of three constituent corporations from its post-merger income attributable to other businesses which also had been separately incorporated and taxed prior to the merger. In its opinion at page 385, this Court made it clear that the *Libson Shops* case "centers on the meaning of 'the taxpayer'" in Section 122(b) of the Internal Revenue Code

[3] In 1957 the Corporation was merged into the petitioner, which thereupon became liable for the deficiency in this case, if any, and therefore is the petitioner herein (R. 22).

of 1939. At the same time, at page 390 in footnote 9, this Court specifically stated that it was not passing on situations where "a *single* corporate taxpayer changed the character of its business and the taxable income of one of its enterprises was reduced by the deductions or credits of another."[4]

Notwithstanding this clear language of this Court's opinion in *Libson Shops*, the Court below rests its decision on the basis that the *Libson Shops* decision did not turn on the meaning of the word "taxpayer" in Section 122(b). Thus, it stated (A-6):

> "Although the Supreme Court *could* have decided *Libson Shops* on the the basis that the 'taxpayer' seeking the deduction was not that which had incurred the losses, it deliberately—indeed, as we would gather, somewhat unexpectedly—placed decision on a ground that strips the distinction asserted by Garfinckel of dispositive significance."

The Court below repeated this assertion later in its opinion (A-7):

> "The Supreme Court's express disclaimer of interest in whether the surviving entity was the same 'taxpayer' as that which had incurred the losses, and its reliance instead on whether the losses were produced by the same 'business' as produced the post-merger profits from which it is sought to deduct them, obliterate Garfinckel's attempted distinction of its case based on the survivorship of the loss corporation."

Thus, the Court below erred in interpreting the *Libson Shops* case as not turning on the meaning of the word

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[4] The present case is even stronger for the taxpayer than the situation described by this Court in footnote 9 since the Corporation did not change the nature of its business but merely acquired by consolidation the assets of a similar business.

"taxpayer" in Section 122(b). The materiality of this misinterpretation of *Libson Shops* is clearly shown by the admission of the Court below (A-4):

> "If we could limit ourselves to the words of the statute, petitioner would prevail."

Moreover, this misinterpretation did not involve a narrow issue of limited applicability, but rather is of fundamental importance to any court which must consider the meaning of *Libson Shops*. Only if this mistaken view of the Court below is corrected will courts and litigants be able to proceed with assurance that this Court did not intend judicially to eliminate the word "taxpayer" from Section 122(b).

The Importance of the Question Presented.

In view of the importance of the question presented, which the Court below regarded as a "difficult" one (A-2) and in order to reduce the volume of future litigation in this uncertain area, it is submitted that this Court should exercise its power of review in this case.

At the present time, there are being litigated a number of cases, some similar to the present case, which apply the *Libson Shops* case to losses sustained by the same corporation which later earns the profits against which it seeks to apply these losses. Several of these cases already have been decided by lower courts and have been brought before various Courts of Appeals or may be appealed in the near future. *Allied Central Stores Inc.*, 1964-45 T. C. Memo., *appeal docketed, Second Circuit; Foremost Dairies Inc.* v. *Tomlinson*, 12 AFTR 2d 5426 (Mid. Dist. Fla. 1963), *appeal docketed, Fifth Circuit; Arthur T. Beckett*, 41 T. C. 386 (1963), *appeal docketed, Ninth Circuit; Frederick Steel Co.*, 42 T. C. 13 (1964), *appeal docketed, Sixth Circuit;*

Fawick Corporation, 1964-35 T. C. Memo., *appeal docketed, Sixth Circuit; Jeremiah J. O'Donnell, Jr.*, 1964-38 T. C. Memo.; *The Humacid Company*, 42 T. C. No. 68 (1964).

Moreover, the problems of interpretation faced by the Court below and by the courts in these other cases will be of continuing importance to the judiciary, to the Internal Revenue Service and to taxpayers. While Sections 381 and 382 of the Internal Revenue Code of 1954 rather than *Libson Shops* are said by the Internal Revenue Service to govern the availability under the 1954 Code of loss carryforwards following certain tax-free reorganizations (see Rev. Rul. 58-603, 1958-2 Cum. Bull. 147), it is clear that there are many other situations similar to the present case where the interpretation of *Libson Shops* is just as important under the 1954 Code as under the 1939 Code. Thus, as was stated by the Court below (A-9):

> "It is easy to think of a series of cases of the acquisition of profitable business by previously losing ones, ranging from the instances expressly dealt with in the cited Ruling, [Rev. Rul. 63-40, 1963-1 Cum. Bull. 46] through cash purchases from a related corporation, purchases for notes or preferred stock—unconvertible or convertible—from corporations unrelated or related, cases like *Kolker Bros.*, [*Kolker Bros. Inc.*, 35 T. C. 299 (1960)] acquisitions of assets by the issuance of common stock small or large in proportion to that already outstanding, transactions like the one in this case, and the 'shell' corporation cases cited below. We would indeed be hard put to devise a formula that would determine just where in the spectrum the *Libson Shops* line would fall."

Indeed, the Court below in effect has asked this Court to review the present case for, as it states in its opinion (A-9):

> "If we have misunderstood that opinion, [*Libson Shops*] we would be even more than usually willing to be corrected, since there is much appeal in Garfinckel's 58% ownership of DePinna during the years of the losses, although the Commissioner counters that in *Libson Shops* there was complete identity in stock ownership before and after merger."

This unusual request for guidance in an important area of the income tax law deserves the serious consideration of this Court.

Conclusion.

In summary, this case presents a decision by the Court of Appeals which constitutes a misapplication of a decision of this Court as to the interpretation of an important provision of the Internal Revenue Code. Furthermore, there are many cases now pending in the courts which involve similar issues. Under the circumstances, the obvious importance of the question presented herein calls for an exercise of this Court's power of review.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 346—September Term, 1963.

(Argued April 16, 1964 Decided July 14, 1964.)

Docket No. 28644

JULIUS GARFINCKEL & Co., INCORPORATED (Successor to Brooks Brothers, Inc., formerly The A. DePinna Company),

Appellant,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Before:

MOORE, FRIENDLY and HAYS,

Circuit Judges.

Petition to review a decision of the Tax Court, Mulroney, *J.*, 40 T. C . 870 (1963), which disallowed a carry-over deduction of losses incurred by the A. DePinna Company prior to and during the first months after its consolidation with Brooks Brothers, from the income of the merged company for the year ended July 31, 1953, all of which income

was attributable to operations formerly conducted by Brooks Brothers. Affirmed.

WALLACE S. JONES, New York, N. Y. (RICHARD R. DAILEY, JOHN A. CORRY), for Appellant.

GILBERT E. ANDREWS (LOUIS F. OBERDORFER, Assistant Attorney General, LEE A. JACKSON, I. HENRY KUTZ, Attorneys, Department of Justice, Washington, D. C.), for Appellee.

FRIENDLY, Circuit Judge:

This petition to review a decision of the Tax Court denying a net operating loss carry-over under §122 of the Internal Revenue Code of 1939 requires us to decide a difficult question as to the effect of *Libson Shops Inc.* v. *Koehler*, 353 U. S. 382 (1957), which we were able to avoid last term in *Norden-Ketay Corp.* v. *C. I. R.*, 319 F. 2d 902 (2 Cir.), cert. denied, 375 U. S. 953 (1963). The question, in substance, is this: When a corporation which has incurred losses but is still actively engaged in business acquires by consolidation another corporation with a history of profits in a similar business, does §122 permit the consolidated corporation to deduct pre-consolidation losses from post-consolidation profits derived solely from operations of the acquired corporation—this in a context in which a single stockholder owned 58% of the common stock of the loss corporation and 100% of the common stock of the profit corporation during the period of the losses and, by virtue of the consolidation, owned 95% of the stock of the surviving corporation? With some hesitation, we have concluded that *Libson* requires a negative answer.

In 1946 and 1947 petitioner Julius Garfinckel & Co., Incorporated, acquired all the stock of Brooks Brothers, a New York corporation long engaged in the retail selling and manufacturing of men's wear. Another New York

corporation, likewise engaged in selling clothing, both men's and women's, at retail, the A. DePinna Company, had an outstanding capital stock of 164,902 shares of common and 37,549 shares of preferred, each convertible into two shares of common. In January, 1950, Garfinckel acquired from DePinna's management 91.869 shares of common and an option on 22,879 shares of convertible preferred, which it exercised December 5, 1952; by an offer to other common stockholders it secured additional common shares, bringing its total to 97,087.76.

On February 6, 1952, the directors of Brooks Brothers, wholly owned by Garfinckel, and of DePinna, controlled by it, adopted resolutions whereby, pursuant to §86 of the New York Stock Corporation Law, the two companies would be consolidated into DePinna, whose name was to be changed to Brooks Brothers, Inc. The 60[illegible] common shares of Brooks Brothers would become 1,217,400 shares of common stock of the consolidated corporation; the common and preferred stocks of DePinna would remain unchanged. The consolidation became effective on February 29, 1952. The Commissioner does not dispute the existence of substantial business reasons for the transaction. The corporation maintained separate records for the Brooks Brothers and DePinna divisions as well as for "Unallocated 'Headquarters' Expenses."

DePinna, which had previously made its income tax returns on the basis of a fiscal year ending January 31, changed to a July 31 fiscal year in 1950. Its returns for the five months ending July 31, 1950, showed a net operating loss of $208,903.27; the 1951 return showed such a loss of $310,851.66; and the return for the year ended July 31, 1952, which included five months of the consolidated operation, showed a net operating loss of $71,037.01. Brooks Brothers had been reporting on the basis of a July 31 fiscal year and filed a final return for the period ending February 29, 1952. In its first report covering a full year's operation, the consolidated corporation, Brooks Brothers, Inc., *né* DePinna, deducted $586,687.78, the sum of the net

operating losses detailed above with a few minor adjustments. The following schedule shows the results by divisions for the fiscal years 1952, 1953 and 1954:

Year	Total	Brooks Brothers Division	DePinna Division	Unallocated "Headquarters" Expenses
7/31/52	($ 71,087.01)	$ 296,727.31	($325,626.82)	($ 42,187.50)
7/31/53	638,837.75	1,020,382.58	(275,211.50)	(106,333.33)
7/31/54	774,270.60	1,145,258.27	(262,605.73)	(108,381.94)

We assume that the "Brooks Brothers" and "Unallocated 'Headquarters' Expenses" figures for 1952 are for five months only and that the $71,087.01 loss for that fiscal year is thus a hybrid obtained by netting a year of DePinna losses with five months of Brooks Brothers profits, but Garfinckel has not urged that any special considerations apply to it. The Commissioner disallowed the carry-over on the basis of *Libson Shops* and the Tax Court sustained him. In 1957 the consolidated corporation was merged into Garfinckel, which became liable for the deficiency in contest and hence is the petitioner here.

Section 122(b)(2)(B) of the 1939 Code says that "If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the five succeeding taxable years . . ." If we could limit ourselves to the words of the statute, petitioner would prevail. "The taxpayer," to wit, DePinna, the surviving corporation, had net operating losses for 1950, 1951 and 1952, and the statute says these may be carried over to 1953.

Against this attractive simplicity the Commissioner raises the formidable barrier of *Libson Shops*. Garfinckel says the case is not dispositive. We agree that the case was different and did not require a decision that would govern the problem here presented; but, on consideration of the broad ground adopted by the Supreme Court, we have been unable to convince ourselves of the existence of a principled basis for reaching a different result.

The "taxpayer" in *Libson Shops* was a Missouri corporation previously engaged solely in the management of

sixteen retail stores, each separately incorporated either in Missouri or in Illinois. All seventeen corporations were owned by the same persons in the same proportions. By merger, the management corporation acquired the sixteen retailing corporations, of which one Missouri corporation and two Illinois corporations had incurred net operating losses and continued to lose after the merger. The Supreme Court would not allow the surviving corporation to deduct the pre-merger losses of these three operating companies. Garfinckel argues that *Libson Shops* determined only that losses cannot "cross the line of corporate fusion" for carry-over purposes unless the profits whence they are to be deducted come from the same business as incurred the losses; the Tax Court, it contends, has misconstrued that decision in depriving a corporation of the right to deduct its own pre-consolidation losses from post-consolidation profits because the latter came from the business acquired.

As indicated, we agree that *Libson Shops* could have been decided on a basis that would not control the issue here presented. Furthermore the *Libson Shops* opinion itself casts some doubts on the scope of the decision by what was to become a celebrated footnote, 353 U. S. at 390:

> "[9] We do not pass on situations like those presented in *Northway Securities Co.* v. *Commissioner*, 23 B. T. A. 532; *Alprosa Watch Corp.* v. *Commissioner*, 11 T. C. 240; *A. B. & Container Corp.* v. *Commissioner*, 14 T. C. 842; *WAGE, Inc.* v. *Commissioner*, 19 T. C. 249. In these cases a *single* corporate taxpayer changed the character of its business and the taxable income of one of its enterprises was reduced by the deductions or credits of another."

The cited cases, other than *Northway Securities*, are by no means so wide of the mark as the Commissioner argues. *WAGE, Inc.* dealt with a problem essentially similar to that before us; and while there may be distinctions with respect to *Alprosa Watch* and *A. B. & Container*, these were in one respect stronger cases for the Commissioner

since in them there had been a complete change not only of business but also of stock ownership between the loss and profit years.[1]

However, it is not enough for Garfinckel to show that its case is different from *Libson Shops* or even that the Supreme Court expressly left the instant issue open. It must show that the difference is relevant to the reasoning on which the Court based its decision and thus is sufficiently significant that we could reasonably anticipate that the Court would wish us to decide differently. Here is where Garfinckel's argument fails. Although the Supreme Court *could* have decided *Libson Shops* on the basis that the "taxpayer" seeking the deduction was not that which had incurred the losses, it deliberately—indeed, as we would gather, somewhat unexpectedly—placed decision on a ground that strips the distinction asserted by Garfinckel of dispositive significance.

Certiorari was sought in *Libson Shops* on the basis that the decision of the Eighth Circuit, 229 F. 2d 220 (1956), refusing to permit a merged corporation to deduct losses previously incurred by merging corporations was in conflict with this Court's decision in *Stanton Brewery, Inc.* v. *C. I. R.*, 176 F. 2d 573 (1949), Judge L. Hand dissenting, and the Ninth Circuit's in *E. & J. Gallo Winery* v. *C. I. R.*, 227 F. 2d 699 (1955), which had allowed excess profits tax credits of a predecessor corporation to "cross the line of corporate fusion" to the successor in a statutory merger. The whole of petitioner's brief on the merits in *Libson Shops* and the bulk of the Government's were devoted to discussing whether the surviving corporation was the same taxable entity, in a legal sense, as the three operating companies that had sustained the losses—the Government arguing that there should be no distinction between an acquisition by merger and a take-over of assets and liabilities for stock, which had been ruled insufficient for a loss

[1] The Commissioner acquiesced in *Northway*, X-2 Cum. Bull. 52 (1931), in *A. B. & Container Corp.*, 1950-2 Cum. Bull. 1, and in *WAGE, Inc.*, 1954-2 Cum. Bull. 6, but withdrew all these three years after *Libson Shops*, 1960-2 Cum. Bull. 8.

carry-over in *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435 (1934), and that the *Stanton* case, regarded as the source of *Gallo Winery* and two decisions subsequent to that under review, *Koppers Co.* v. *United States*, 134 F. Supp. 290 (Ct. Cl. 1955), cert. denied, 353 U. S. 383 (1957), and *Newmarket Mfg. Co.* v. *United States*, 233 F. 2d 493 (1 Cir. 1956), cert. denied, 353 U. S. 383 (1957), if not distinguishable, had been wrongly decided. Only in the final pages of its brief did the Government advance the argument that "Even if regarded as the same taxable entity as its predecessors, taxpayer is not entitled to the claimed operating loss deduction since its business was not the same." This argument, barely touched on in the taxpayer's reply brief, was what the Court adopted, 353 U. S. at 386. Apparently impatient of metaphysical discussions respecting the limits of corporate life, the Court decided that, for the purposes of §122, economics rather than legal niceties should prevail. The Court found no indication in the legislative history of the loss carry-over provisions that they "were designed to permit the averaging of the pre-merger losses of one business with the post-merger income of some other business which had been operated and taxed separately before the merger. What history there is suggests that Congress primarily was concerned with the fluctuating income of a single business." 353 U. S. at 386-87. The three operating corporations, which continued to lose after the merger, could not have used the loss carry-overs if they had stayed separate. Since the purpose of the carry-over provision was "not to give a merged taxpayer a tax advantage over others who have not merged," the Court concluded "that petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses."

The Supreme Court's express disclaimer of interest in whether the surviving entity was the same "taxpayer" as that which had incurred the losses, and its reliance instead on whether the losses were produced by the same "business" as produced the post-merger profits from which it is

sought to deduct them, obliterates Garfinckel's attempted distinction of its case based on the survivorship of the loss corporation. We find no reason to think the Supreme Court would have decided *Libson Shops* differently if the fourteen profit-making corporations had been merged into the three losing corporations and these had survived.

The years have indeed revealed that the test of a continuing "business" entity creates at least as many problems as the more arbitrary but more certain one that had preceded it—in addition to the basic incongruity of forcing a merged corporation, during the period of a potential loss carry-over, to keep asunder what the merger was supposed to have joined, with the accounting problems that may attend upon this.[2] These problems are considerably more acute when, in contrast to the *Libson Shops* situation of a profit company acquiring a loss company, where §129 of the 1939 Code alone will often carry the day for the Commissioner, a loss company for valid business reasons acquires a profit company. The purpose of the carry-over and carry-back provisions "to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year," 353 U. S. at 386, demands that a corporation that has failed in one line of activity and then has succeeded in another should be able to set off the results of the bad years against those of the good. Once that is posited, it becomes hard to draw an intelligible

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[2] See Sinrich, Libson Shops—An Argument against Its Application under the 1954 Code, 13 Tax L. Rev. 167, 174 (1958). In Rev. Rul. 59-395, 1959-2 Cum. Bull. 475, 479, the Commissioner took the position that any carry-over deduction following merger or consolidation is disallowed under the 1959 Code unless the records of the resulting corporation are so maintained as to enable the IRS to make a reasonably conclusive determination what part of the profits of the merged corporation is attributable to the assets which incurred the pre-merger losses. A recent decision of the Tax Court supports this. See *Allied Central Stores, Inc.* v. *CIR*, T. C. Memo. 1964-45, CCH Tax Ct. Mem. ¶26,668 (M).

We note for clarity that our opinion in this case does not touch the question of the role of *Libson Shops* under the 1954 Code.

line between a case where a corporation has provided itself with assets to establish a new business and another where it has bought a business already established. The Commissioner recognized this in Rev. Rul. 63-40, 1963-1 Cum. Bull. 46, announcing that the Service would not rely on the rationale of *Libson Shops* in cases where, without significant changes in stock ownership, a loss corporation purchased for cash the business of a non-related corporation, although reiterating his non-acquiescence, see 1963-1 Cum. Bull. 5, in *Kolker Bros. Inc.* v. *C. I. R.*, 35 T. C. 299 (1960), in which the Tax Court declined to apply *Libson Shops* where the purchase of the new business was partly financed by funds borrowed from outsiders who shortly exchanged the debt for 46% of the stock of the acquiring corporation. It is easy to think of a series of cases of the acquisition of profitable businesses by previously losing ones, ranging from the instances expressly dealt with in the cited Ruling, through cash purchases from a related corporation, purchases for notes or preferred stock—unconvertible or convertible—from corporations unrelated or related, cases like *Kolker Bros.*, acquisitions of assets by the issuance of common stock small or large in proportion to that already outstanding, transactions like the one in this case, and the "shell" corporation cases cited below. We would indeed be hard put to devise a formula that would determine just where in this spectrum the *Libson Shops* line would fall. We can make only the unilluminating statement that a transaction in which a 58% owner of a loss corporation causes it to acquire a wholly owned profit corporation, with a consequent increase in its ownership of the survivor to 95%, the discontinuity between the before and the after seems sufficient to cause the case to be attracted by *Libson Shops*. If we have misunderstood that opinion, we would be even more than usually willing to be corrected, since there is much appeal in Garfinckel's 58% ownership of DePinna during the years of the losses, although the Commissioner counters that in *Libson Shops* there was complete identity in stock ownership before and after merger.

Both parties rely on the many decisions applying *Libson Shops* to disallow loss carry-overs under §122 where new stockholders have poured profitable assets into a loss corporation that had abandoned or nearly abandoned its business. *C. I. R.* v. *Virginia Metal Products, Inc.*, 290 F. 2d 675 (3 Cir.), cert. denied, 368 U. S. 889 (1961); *J. G. Dudley Co.* v. *C. I. R.*, 298 F. 2d 750 (4 Cir. 1962); *Mill Ridge Coal Co.* v. *Patterson*, 264 F. 2d 713 (5 Cir.), cert. denied, 361 U. S. 816 (1959); *Willingham* v. *United States*, 289 F. 2d 283 (5 Cir.), cert. denied, 368 U. S. 28 (1961); *Norden-Ketay Corp.* v. *C. I. R.*, 319 F. 2d 902 (2 Cir.), cert. denied, 375 U. S. 953 (1963); *Huyler's* v. *C. I. R.*, 327 F. 2d 767 (7 Cir. 1964). Garfinckel stresses the emphasis placed by these opinions on the "shell" character of the corporation and on the complete or nearly complete discontinuity in stock ownership. But this was simply the normal practice of a court's deciding an easier case on a satisfying basis that was readily available rather than unnecessarily wrestling with a more difficult one; we can give testimony on this with respect to *Norden-Ketay*. The lesson that the Commissioner draws from these cases is more to the point, namely, that *Libson Shops* is not rendered inapplicable by the fact that the surviving corporation which seeks the deduction is the same corporation that incurred the losses.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 574

JULIUS GARFINCKEL & CO., INCORPORATED (SUCCESSOR TO BROOKS BROTHERS, INC., FORMERLY THE A. DEPINNA COMPANY), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Prior to February 6, 1952, taxpayer Julius Garfinckel & Company, Incorporated, owned 100% of the common stock of Brooks Brothers, a corporation engaged in the manufacturing and retail sale of men's wear, and 58% of the common stock of the A. DePinna Company, a corporation engaged in the sale of both men's and women's clothing at retail. On February 6, 1952, Garfinckel caused Brooks Brothers to be consolidated into DePinna pursuant to Section 86 of the New York Stock Corporation Law (McKinney's Consolidated Laws of New York Annotated, Vol. 58), and the name of the continuing DePinna corporation was changed to Brooks Brothers. Under the terms

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of the merger, Garfinckel wound up with 95% of the stock of the surviving corporation. Subsequent to the consolidation, the businesses previously carried on by DePinna and Brooks Brothers were operated as separate divisions of the consolidated corporation with separate records (Pet. A2–A4).

Net operating losses had been sustained by DePinna prior to the consolidation, and the DePinna division of the consolidated corporation continued to lose money thereafter. Brooks Brothers, on the other hand, had been a profitable enterprise prior to the consolidation and the Brooks Brothers division continued to make money after the consolidation. The question in this case is whether the pre-merger losses of the DePinna business (retail sale of men's and women's clothing) may be used to offset the post-merger income generated by the Brooks Brothers business (manufacture and retail sale of men's wear) under the net operating loss carryover provision, Section 122(b)(2)(B) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed., Sec. 122). The action of the Commissioner of Internal Revenue in disallowing the claimed carryover for the year ending July 31, 1953, was sustained by the Tax Court, which was, in turn, affirmed by the Court of Appeals. As viewed by both courts below, the claimed income tax deduction was barred by the "continuity of business enterprise" rule enunciated by this Court in *Libson Shops, Inc.* v. *Koehler*, 353 U.S. 382 (Pet. A2–A4, A10).

The decision below was correct. There is no conflict of decisions nor any other reason warranting further review by this Court.

1. The rule prescribed in *Libson Shops, Inc.* v. *Koehler, supra,* is that a taxpayer may not carry forward the net operating losses of one business to offset income generated by another business. The "continuity of business enterprise" test is a definitive statement of the purposes which Congress intended to be served by the carryover provisions, and it has been applied by the federal appellate courts to a broad range of fact situations. Whatever its scope, however the *Libson Shops* decision is clearly dispositive of the case at bar.

In *Libson Shops,* sixteen corporations operating retail stores selling women's apparel were merged into a seventeenth corporation which had been providing management services for the sales corporations. All of the corporations were owned by the same individuals whose proportionate ownership interests were the same before and after the merger. Three of the sales constituents incurred operating losses before and after the merger. The surviving corporation attempted to carry forward the pre-merger losses to offset income of the post-merger consolidated enterprise. Holding that the surviving corporation was not the same "taxpayer" (within the meaning of Section 122(b) of the 1939 Code) as its pre-merger constituents, this Court declared that the purpose of the carryover provisions was not to give a merged taxpayer tax advantages over others who did not merge, concluding with the statement that (p. 390) "petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced

by substantially the same businesses which incurred the losses."

Similarly, in the instant case, taxpayer, the complete owner of a profitable corporation which operated retail stores and engaged in the manufacturing of clothing, caused it to be merged into another corporation in which taxpayer owned a controlling interest. The second corporation, which had been running at a loss, was engaged solely in the operation of retail stores not connected with the profit corporation. After the merger, the two businesses were operated as separate divisions; the loss enterprise continued to produce losses and the profit enterprise continued to generate income. The question here is whether the pre-merger losses of the loss enterprise may be carried forward to offset income of the consolidated corporation attributable solely to the profit enterprise.

As both courts below correctly held, allowance of the claimed net operating loss carryover is barred by the rule in *Libson Shops*. It is immaterial—a mere technical maneuver—that the loss corporation was chosen to be the surviving corporation. Neither the tenor nor the terms of the *Libson Shops* opinion permit anything to turn on this happenstance, as the federal appellate courts applying *Libson Shops* consistently have stated. Accord: *Federal Cement Tile Co.* v. *Commissioner,* (C.A. 7th), decided October 23, 1964 (64-2 U.S.T.C., par. 9803); *Norden-Ketay Corp* v. *Commissioner,* 319 F. 2d 902 (C.A. 2d), certiorari denied, 375 U.S. 953; *Mill Ridge Coal Co.* v. *Patterson,* 264 F. 2d 713 (C.A. 5th), certiorari denied, 361 U.S. 816; *Willingham* v. *United States,* 289 F. 2d 283

(C.A. 5th), certiorari denied, 368 U.S. 828; *Commissioner* v. *Virginia Metal Products, Inc.*, 290 F. 2d 675 (C.A. 3d), certiorari denied, 368 U.S. 889; *J. G. Dudley Co.* v. *Commissioner*, 298 F. 2d 750 (C.A. 4th); *Huyler's* v. *Commissioner*, 327 F. 2d 767 (C.A. 7th).

2. Taxpayer asserts that the court of appeals misconstrued the *Libson Shops* opinion, failing to recognize that the question in loss carryover cases is whether the "taxpayer" who sustained the losses is the same as the "taxpayer" who will reap the benefit of the loss carryover (Pet. 5–7). As pointed out by the court below (Pet. A6–A8), however, this is a misleading over-simplification of the issue. Although the same jural entity may be involved, the dispositive question is whether, in practical, economic terms, the business which produced the losses is the same business which generates the income sought to be offset by the carryover. This Court, in characterizing the alternative argument of the Government which it ultimately accepted, stated (*Libson Shops*, p. 386):

> It argues that the prior year's loss can be offset against the current year's income only to the extent that this income is derived from the operation of substantially the same business which produced the loss. Only to that extent is the same "taxpayer" involved.

Contrary to the position of taxpayer, the *Libson Shops* rationale was not misconstrued by the court of appeals, nor, for that matter, has it been misconstrued or even regarded as difficult to understand by any other federal appellate court. See, particularly, the so-called "single corporation" cases in which the loss

corporation admittedly was the same jural entity which sustained the loss but the carryover privilege was regarded, under *Libson Shops,* as barred. *J. G. Dudley Co.* v. *Commissioner, supra; Commissioner* v. *Virginia Metal Products, Inc., supra; Mill Ridge Coal Co.* v. *Patterson, supra; Huyler's* v. *Commissioner, supra; Norden-Ketay Corp.* v. *Commissioner, supra.*

3. The question involved in this case is of diminishing importance in the administration of the loss carryover provisions. Loss carryovers following tax-free organizations are specifically limited under the 1954 Code. See, e.g., Sections 381 and 382(b) (26 U.S.C., 1958 ed., Secs. 381 and 382). See, also, Rev. Rul. 58–603, 1958–2 Cum. Bull. 147, and Rev. Rul. 59–395, 1959–2 Cum. Bull. 475, 480. If, as taxpayer suggests, this Court should agree to review a loss carryover case for the purpose of resolving all of the unanswered questions as to the scope of *Libson Shops* in fact situations which have not yet arisen in the litigated cases, this case—which involves the Internal Revenue Code of 1939—would be a peculiarly inappropriate vehicle for that purpose.

The petition for certiorari should be denied.

Respectfully submitted.

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DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964